

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA-22-0063

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**MICHAEL SANTACROCE,**

**Plaintiff/Appellee,**

**vs.**

**KENNITH G. FERRON,**

**Defendant/Appellant.**

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On Appeal from the Montana Eleventh Judicial District Court  
County of Flathead  
Cause No. DV-19-1029(A)  
Honorable Amy Eddy Presiding

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**APPELLANT'S BRIEF**

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Appearances:

Stephanie M. Breck, Esq.  
Breck Law Office, PC  
Post Office Box 2071  
Columbia Falls, MT 59912  
Telephone: (406) 892-4446  
Telefax: (406) 892-4449  
Email: stephanie@brecklawoffice.com

Richard De Jana  
Richard De Jana & Associates, PLLC  
Post Office Box 1757  
Kalispell, MT 59903  
Telephone: (406) 752-4120  
Telefax: (406) 752-5105  
Email: jdejana@montanasky.net

*Attorneys for Defendant/Appellant*

*Attorneys for Plaintiff/Appellee*

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## **STATEMENT OF ISSUES**

1. Did the District Court err in finding that the Ferron property has been used for commercial purposes in violation of ¶¶ 1 and 3 of the covenants?
2. Did the District Court properly conclude that Plaintiff was entitled to injunctive relief and the resulting award of attorney fees?

## **STATEMENT OF THE CASE**

Plaintiff Michael Santacroce filed this civil action in Flathead County District Court against his neighbor, Kenneth G. Ferron, on October 17, 2019 alleging that Kenneth was operating a “commercial gymnasium” on his property (the “Ferron Property” herein) in violation of the restrictive covenants governing the use of the subject property. Complaint, Dkt. 1. Plaintiff also alleged that the alleged commercial gymnasium played “extremely loud, heavily based, vibration causing music,” and had “customers using the roadway,” creating a disturbance of Plaintiff’s quiet enjoyment of his property. *Id.* Plaintiff sought a permanent injunction from the Court to stop the operation of the alleged commercial gymnasium and the vibration causing music on the Ferron Property. Complaint, Dkt. 1. Finally, Plaintiff alleged that the loud music coming from the alleged commercial gymnasium had caused physical damage to Plaintiff’s house for which Plaintiff should be compensated and that, per the language of the covenants, Kenneth should be responsible for Plaintiff’s attorney fees in bringing the action. *Id.*

The Complaint and Summons were not served on Kenneth until January 29, 2020. Dkt. 3. Kenneth filed an Answer on February 24, 2020. Dkt. 4. Plaintiff made an unsuccessful attempt at summary judgment and the parties were unable to resolve the matter through mediation. Dkt. 19-20.

After a two-day bench trial held on May 6 – 7, 2021, the District Court issued its Findings of Fact, Conclusions of Law and Order, and Judgment with Permanent Injunction, finding that the Ferron Property had been used for a commercial purpose and granting a permanent injunction against Kenneth, along an award of attorney fees to Plaintiff. Order, Dkt. 48. Plaintiff’s claims based on the alleged music and vibrations emanating from the Ferron Property failed, as did his claim that the alleged vibrations cause damage to his home. Id. Ferron appeals the District Court’s Findings of Fact, Conclusions of Law and Order and Judgment with Permanent Injunction only as to the issues outline above.

## **STATEMENT OF THE FACTS**

### **I. History of Ferron Property**

Appellant Kenneth Ferron purchased his property, located at 3000 MT Hwy. 35 in Kalispell, Montana, in 1982 (the “Ferron Property” herein). Order, Dkt. 48, FOF 2; Plaintiff’s Ex. 2. Kenneth deeded the Ferron Property to himself and his wife at the time, Diane Ferron, in January 2005. Order, Dkt. 48, FOF 2.

## A. Covenants Restricted Property to Residential Use Only

The property is subject to a set of covenants. Order, Dkt. 48, FOF 5. The original covenants were adopted in June of 1978 and later amended in December 1982. Order, Dkt. 48, FOF 6. The pertinent portions of the covenants for purposes of this appeal are:

¶ 1: “Use of any road upon the subject property shall be limited to the permissible land uses listed herein.”

¶ 3: “No land or buildings may be used **except for residential purposes only**, and no type of buildings may be erected, altered, placed or permitted to remain except for residential purposes, to include garages, livestock barns and shelter, and storage. No dwelling, building or other structure may be occupied as a multi-family dwelling. **No part of the subject property shall be used at any time for any business, trade, manufacture or any other commercial purpose whatsoever**, except as follows:

a. Sales activity necessary to promote the development of the subject property.

b. Personal home office activity for a professional business person.

c. Normal agricultural use shall be maintained on areas not immediately occupied for residential purposes. Agricultural products and crops may be grown. Farm animals such as livestock and fowl may be kept and raised, only for personal use. In order to avoid a large number of large animals concentrated in a small area, feed lots, poultry and swine lots are expressly prohibited.”

¶ 13: “The parties hereto and every person here after receiving any right, title or interest in any tract in the subject property, shall have the right to prevent or stop violation of any of the covenants by injunction or other lawful procedure, in law or in equity, against the person or persons violating or threatening to violate these covenants.

Any person who shall prosecute any action successfully may recover any damage resulting from such violation.”

¶ 14: “Should suit be brought on these covenants and restrictions, a reasonable attorney’s fee shall be awarded to the prevailing party.” Id.

## **B. The Ferron Family and Their Use of the Ferron Property**

During their marriage, Kenneth and Dianne Ferron had 3 daughters together and also took in a fourth unrelated girl. Tr. 230-231. The girls were all raised on the property. Id. Kenneth owned his own insurance agency and worked full-time in the insurance industry until a debilitating accident ultimately caused a decline in his functions and he was unable to maintain his license. Tr. 234, 237. He was also an avid bodybuilder and provided some fitness and nutrition training to others. Tr. 239; Defendant’s Exhibit E. Diane Ferron taught dance classes at this time. Tr. 240.

At some point in or around 2004, the Ferron’s built a structure on the Ferron Property that served as an area to move and house their weight training equipment from another location where they were providing training services and also served as a dance studio for Diane Ferron’s dance students. Tr. 39, 239-240, 314. The space also provides a shop/storage/garage area for recreational and other vehicles. Plaintiff’s Ex. 15, 17; Tr. 18, 314. The space was intended to be used by friends and family but both Ferrons provided some paid fitness and/or dance training in the structure while they were married and acknowledge that their actions of providing such training (not the building of the structure itself) were in violation of the

covenants regarding business/commercial activity. Tr. 39, 41, 45, 239. There is no real dispute that prior to 2016, the Ferron Property was sometimes utilized for non-residential purposes by both Kenneth and Diane Ferron. Order, Dkt. 48, FOF 10.

**C. The “Little Barn House” Rental Next Door to Ferron Property**

Just next to the shop/gym structure, there is a small house, referred to as the “little barn house” by Ferron. Tr. 283. It is and has been a rental home and was previously owned by an individual named Sherry. Tr. 283, 284. The Ferrons and Sherry worked together (Sherry contributed about 20% of the cost) to correct a sloping problem that was causing some flooding issues and to create a graveled parking area between the little barn house and the shop/gym structure. Tr. 283, 284. The parking area was created to serve both the Ferron’s friends, family and guests as well as to provide more than the single existing parking space for the little barn house, accommodating the renters’ vehicles and their visiting friends and family. Id.

**D. The Ferrons Divorce**

Marital discord and impending divorce from Diane caused Kenneth to move out and leave the Ferron Property in 2010. Tr. 239. Divorce proceedings began in earnest and Diane Ferron moved out of the Ferron Property in 2012. Tr. 43, 47. Diane Ferron has not been back to the Ferron Property since 2012. Id. After Diane’s departure in 2012, Kenneth moved back into the Ferron Property. Tr. 239. Kenneth’s

girlfriend, Gena Mahilom, moved into the Ferron Property in November 2012. Tr. 157.

## **II. Kenneth and Gena's Use of the Property**

At the time she moved into the Ferron Property with Ken in 2012, Gena was (and still is) a full-time professional masseuse at Iron Horse, a private residential community in Whitefish, Montana. Tr. 146. Gena works approximately six days per week, doing six massages per day at Iron Horse and considers being a masseuse her full-time occupation. Tr. 146. Gena also has some mobile massage clients that she serves in their own homes or another off-site location from the Ferron Property. Tr. 151, 153, 156. Gena has a workspace at the Ferron Property for personal home office activity related to her massage business, as is permitted by the covenants at paragraph 3(b). Order, Dkt. 48, FOF 13. She occasionally provides massage there to friends and family at no charge. Tr. 138; Tr. 146; Order, Dkt. 48, FOF 13. Gena does not run a commercial massage operation from the Ferron Property. Tr. 138; Tr. 146.

Gena has adult children that do not currently live with her and Kenneth but they do come for extended visits and have at times lived with Gena and Kenneth since 2012. Tr. 92-93; Plaintiff's Ex. 9.

Ken's daughters were regular visitors to the property, as were other family members of both Gena and Kenneth. Tr. 230-231; Both also have many friends that

visited and spent time at the house, in the garage or elsewhere on the Ferron Property, enjoying the things that friends and families do together on their own property, such as family celebrations, working on projects, working out in the shop/gym area, visiting. Tr. 230-231; 312-313. Kenneth's son in law Cole also visits regularly to do archery with Kenneth in the shop/gym building. Tr. 283.

In or around 2019, Kenneth's cousin Zach lived at the Ferron Property for an extended period. Tr. 261-262; Tr. 281. One of Ken's daughters, Stephanie, and her two school aged children also lived with Kenneth and Gena in or around 2019. Tr. 264-265. Stephanie's children were schooled off-site and were driven to and picked up from school each day by Kenneth or his daughter, Stephanie. Tr. 265. Ken's daughter Stephanie also worked and drove her own vehicle up and down the road to work. Id; Tr. 281-282.

The Ferron Property also had multiple service providers to the property between 2018 - 2021. Tr. 281 – 283. The Ferron Property had multiple visits from pest control providers, weed control providers, electrical service providers, a fish tank cleaning service, at least two construction contractors working on remodeling the basement, and workers for a Flathead Electric project. Id.

There is no question that the road leading to the Ferron Property was traveled often by multiple vehicles, multiple times per day. Kenneth, Gena, family members, friends, the renters of the little barn house and their family and friends, and many

service providers and contractors used the road very often to access the Ferron Property and the little barn house rental. Tr. 92-93; 230-231; 312-313; 264-265; 281-283.

### **III. Kenneth's Relationship with Plaintiff and Kathy Redd**

Plaintiff acquired his property in 2009. Order, Dkt. 48, FOF 1. Plaintiff's partner, Kathy Redd, lived in the residence beginning in 2010 but Plaintiff did not actually begin living at the property until 2014. Order, Dkt. 48, FOF 1.

Kenneth's first real interactions with Redd were in 2014 when a neighbor recommended to Redd that she seek fitness services from Kenneth in preparation for a knee surgery she was to have. Tr. 52-53. Redd contacted Kenneth and he briefly provided some fitness training to Redd in 2014. Id. Kenneth first met Plaintiff when Plaintiff came pounding on the door of the shop/gym area and accused Kenneth of having sex with his wife (Redd). Tr. 244. Kenneth was surprised by Plaintiff's behavior. Id. Although Plaintiff later apologized, Kenneth said no when Plaintiff asked to be able to use the shop/gym area as he did not need any further drama in his life. Tr. 244-45.

After Kenneth denied Plaintiff the ability to utilize the gym equipment on the Ferron Property, Plaintiff and Redd continued to call Kenneth to complain about a multitude of things involving the Ferron Property, the neighbors, alleged noises and vibrations, and in particular, Plaintiff complained that he was bothered by the stereo

system in Kenneth's shop/gym area. Tr. 245-255. Eventually, Kenneth stopped taking their calls. Tr. 255. Around the same time, Plaintiff also raised the issue of creating an HOA that Kenneth was not interested in and that upset Plaintiff. Id. Kenneth

#### **IV. Ferron Divorce and Impact on Kenneth and Use of Shop/Gym Area.**

The Ferrons' divorce was final in or around 2014 but the division of assets and further drama carried on well into 2015. Plaintiff's Ex. 9. After all that he had been through with the divorce and the division of assets, Kenneth decided that he was not interested in building any business that might ultimately be taken away from him. Tr. 238. Kenneth had also become a caretaker to his elderly parents, both of whom were struggling with physical and mental health issues. Tr. 263. Kenneth began taking care of them on a regular basis and working on remodeling and/or fixing up his parents' home in Kalispell so that it could be sold to fund their long-term care expenses. Id. In order to do this for his parents and still be able to support himself, Kenneth had to rely on some savings, selling personal property (such as an oriental rug he sold for \$65,000.00 in or around 2015), and borrowing money from others. Tr. 318-319; 320; 322-323.

There was no further training or use of the gym area by paying customers after approximately 2016. Tr. 286. Gena made two Facebook posts on an unknown date prior to February 26, 2017 in regard to fitness training. Plaintiff's Ex. 23, pgs. 7-9. One mentioned, amongst other things, that she and Kenneth owned a "private gym

facility in Kalispell.” Plaintiff’s Ex. 23, pgs. 7. The other post discussed fitness in general, a particular fitness machine owned by Gena, the fact that she was located in Kalispell, and that she was offering a “60 minute fitness session \$50.” Plaintiff’s Ex. 23, pgs. 8-9. But beyond the fitness clients Gena saw in their own homes and/or at Iron Horse, Gena had no fitness clients that paid to work with her at the Ferron Property. Tr. 267-270. Furthermore, Gena made no social media posts about providing fitness training sessions or offering any service whatsoever after the two posts that were made on some unknown date prior to February 26, 2017. Tr. 267-270. Plaintiff’s Exhibit 23.

After the divorce from Diane Ferron, Kenneth ultimately decided that providing any paid fitness services was not worth the paltry income or the legal risk and he limited use of the gym area to only himself, Gena, family and select friends. Tr. 241. No family or friend of Kenneth or Gena ever paid to use the gym area/shop after 2016. Tr. 263; 286.

In or around 2017, Gena and Ken briefly helped a close friend, Sabrina Wisher, with some fitness and strength training instruction in gym area/shop to assist her in moving and managing her severely disabled daughter. Tr. 146-147; Tr. 240-241. They did not charge Wisher anything for their services. 146-147.

In 2019, Gena formed an LLC called Advanced Functional Fitness. Plaintiff’s Exhibit 20-22; Tr. 140. The LLC was formed at the request of Gena’s employer, Iron

Horse, because Gena was providing fitness services to some residents of Iron Horse as a contractor. Id. The formation documents included the address of the Ferron Property as her physical address because, as a contractor that provided mobile services, she had no other address to provide. Tr. 141, 153. Gena used the name Advanced Function Fitness in a single Facebook post in 2020 but did not advertise any service in the post. Plaintiff's Exhibit 23, pg. 1; Tr. 141-143.

**V. Kenneth Continued Trying to Appease Plaintiff on the Alleged Sound and Vibration Issue But There Was No Pleasing Plaintiff.**

From the time that Plaintiff moved into his home in 2014, he and Redd began complaining about loud music and "vibrations" they claimed were emanating from Kenneth's shop/gym area. Tr. 245-246. Kenneth really tried to work with Plaintiff to figure out a solution because Kenneth did not want to be disturbing his neighbors and wanted to be left in peace. Id. Kenneth even agreed with Plaintiff at one point to never raise the volume any higher than "30" and Plaintiff agreed that was an acceptable level. Tr. 245-246. But Plaintiff continue to complain about more and more issues with music, sound and vibrations and not just from Kenneth's place but from other neighbors, animals, and unknown sources that Kenneth could not hear and/or had no control over. Tr. 245-255. As Plaintiff's complaints became more and more outlandish and aggressive, Kenneth decided that he was no longer going to take Plaintiff or Redd's calls. Tr. 255. Even after Kenneth stopped taking their calls, he

did not violate the sound agreement, keeping to the 30 volume setting from the time of the agreement in or around 2016. Tr. 263; 286-287.

On September 3, 2019, Kenneth received a letter from Plaintiff's legal counsel, threatening this lawsuit if Kenneth did not stop operating his "commercial gymnasium" and stop the alleged music and vibrations emanating from the shop/gym. Defendant's Exhibit B. Kenneth was perplexed to say the least, as he had not violated the sound agreement and was surely not operating a "commercial gymnasium" for profit on his property. Tr. 261.

The only people using the shop/gym area at the time were Kenneth, Gena, family and a few friends, including Stephanie Breck, legal counsel to Kenneth in this matter. Tr. 286; Tr. 9-10. Breck, a fellow competitive bodybuilder, had connected with Gena via social media sometime in 2018 and began a friendship that included training together at Kenneth and Gena's place on occasion. Tr. 10. Breck did not pay Kenneth or Gena for any training services or for use of the gym. Tr. 9-10; Tr. 20-22. Gena and Breck were workout partners during 2018 and 2019 but even Breck's visits dropped off in 2020 with only an occasional visit. Tr. 9-10.

After receiving DeJana's letter, Kenneth did not change anything about his behavior or use of his property because he was not doing any of the things that were alleged by Plaintiff. Tr. 285-287. But Plaintiff persisted in his claims and Kenneth was served with this lawsuit on January 29, 2020. Dkt. 3.

A settlement conference was held in October, 2020 to try and resolve the matter but it was unsuccessful and the matter proceeded to trial. Dkt. 19; 31.

### **STANDARD OF REVIEW**

Review of issue 1 is for clear error. Findings of fact are reviewed for clear error. *Interstate Production Credit v. DeSaye* (1991), 250 Mont. 320, 322-23, 820 P.2d 1285, 1287. "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474, 803 P.2d 601, 603.

In *Interstate Production*, the Court explained the standard of review as it relates to a bench trial:

“This Court will affirm the findings of a trial court sitting without a jury unless the findings are clearly erroneous. Rule 52(a), M.R.Civ.P. In comparison, this Court will affirm the verdict of a jury if there is substantial credible evidence in the record to support the verdict. It is necessary to clarify these two standards and their proper application.

Substantial credible evidence when used to support a jury verdict is fairly well understood; however, when substantial evidence is used in the clearly erroneous standard it is less clear. If a finding is not supported by substantial evidence it is clearly erroneous. The converse proposition that a finding supported by substantial evidence cannot be clearly erroneous is not true in a non-jury case. Wright and Miller, 9 Federal Practice and Procedure, Civii § 2585 at p. 735. "Substantial evidence and clearly erroneous are not synonymous and a finding may be set aside, though supported by substantial evidence if found to be clearly erroneous." *W.R.B. Corp. v. Geer* (C.A. 5th, 1963), 313 F.2d 750.

We adopt the following three-part test to determine if a finding is clearly erroneous. First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of evidence. *Western Cottonoil Co. v. Hodges* (C.A. 5th 1954), 218 F.2d 158; *Narragansett Improvement Company v. United States* (1961), 290 F.2d 577. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may still find that "A finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.* (1948), 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 746."

*Interstate Production* at 250 Mont. 322-323.

The standard of review for the second issue as to the injunction is for an abuse of discretion. It is well-established that the granting of an injunction is a matter of discretion resting in the District Court and it will be sustained unless an abuse of discretion is shown. *Madison Fork Ranch v. L & B Lodge Pole Timber Prods.* (1982), 189 Mont. 292, 302.

### **SUMMARY OF ARGUMENT**

The District Court's finding that the Ferron Property is currently being used for commercial purposes in violation of the covenants is not supported by substantial evidence. The testimony of Plaintiff and Redd does not support the Court's finding of commercial use of the Ferron Property. Traffic coming up and down the road and the "parking lot" near the little barn house do not establish that the Ferron Property or the road were being used for a commercial purpose. Evidence of people parking

and going into the gym after 2016 does not establish a commercial use of the property, nor does Redd's testimony regarding Gena's social media postings. Kenneth's testimony regarding prior commercial use does not establish any current commercial use of the Ferron Property and his lack of demonstrable income is certainly not substantial evidence that Ferron is operating a commercial fitness business from his property. Gena's testimony and social media posts do not establish that any commercial business or transactions took place on the Ferron Property after 2016. Finally, the biased and unsupported testimony of Kenneth's bitter ex-wife Diane is not substantial evidence of a current commercial use of the Ferron Property. For these reasons, the District Court's decision to grant the permanent injunction and resulting attorney fees must be reversed, removing the permanent injunction and awarding attorney fees to Kenneth.

### **ARGUMENT**

#### **I. THE COURT'S FINDING THAT THE FERRON PROPERTY IS CURRENTLY BEING USED FOR COMMERCIAL PURPOSES IN VIOLATION OF THE COVENANTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The core issue on appeal is the trial court's finding that the Ferron Property has been used for commercial purposes in violation of ¶¶ 1 and 3 of the covenants. Order, Dkt. 48 (FOF 17). Kenneth and his ex-wife, Diane Ferron, both acknowledged and the court appropriately found that prior to 2016, the detached gymnasium/shop was used by the Ferrons for commercial purposes. Order, Dkt. 48, FOF 10; Tr. 41.

But the court's finding that the Ferron Property has, since 2016, been used for commercial purposes is clearly erroneous and this Court must reverse.

In Findings of Fact Nos. 12, 14, 15 and 16, the Court explained its reasoning and the evidence it relied upon in finding that the Ferron Property has been used for commercial purposes in violation of ¶¶ 1 and 3 of the covenants. The factors considered by the Court were:

- The testimony of Plaintiff and Redd as to “the increased traffic up and down the road, people parking and going into the gym with gym bags, social media postings, etc.” (FOF 16)
- Kenneth's testimony that they had stopped offering any personal training, other than to family and friends who have access to the gym, at some point after 2014; (FOF 14)
- Ferron's lack of income since 2015; (FOF 15)
- Gena's testimony and social media postings. (FOF 12)
- Diane Ferron's testimony that she currently has friends who are still paying to train at the gym; (FOF 12 and 14)'

The District Court's findings of fact simply do not reflect the evidence that was presented at trial.

**A. The Testimony of Plaintiff and Redd Does Not Support the Court's Finding of Commercial Use of the Ferron Property.**

The Montana Supreme Court reviews a district court's findings of fact to determine whether the findings are clearly erroneous. Rule 52(a), M.R.Civ.P.; *In re Marriage of Pfeifer* (1997), 282 Mont. 461, 467, 473, 938 P.2d 684, 688, 692. A finding is clearly erroneous only if it is not supported by substantial evidence, the trial court misapprehended the effect of the evidence, or our review of the record

convinces us that a mistake has been committed. *In re Marriage of Stufft* (1996), 276 Mont. 454, 459, 916 P.2d 767, 770. This Court has defined substantial evidence as "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Barrett v. Asarco Inc.* (1990), 245 Mont. 196, 200, 799 P.2d 1078, 1080. In determining whether a finding of fact is clearly erroneous, "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), M.R.Civ.P.

In its Findings of Fact, Conclusions of Law and Order, the District Court found that "Santacroce and Redd testified credibly as to the increased traffic up and down the road, people parking and going into the gym with gym bags, social media postings, etc." Order, Dkt. 48, FOF 16.

While the District Court may have found that Plaintiff and Redd testified credibly, the fact is that their testimony does not support the finding of use for a commercial purpose after 2016. If anything, the testimony of Plaintiff and Redd supports the fact that there was some significant traffic on Kenneth's road, some of those vehicles parked near the gymnasium/shop building, some of the people in those vehicles that parked walked from their cars toward the building with a bag in hand, and Gena Mahilom posted about living a fitness-based lifestyle and training on social media in or around very early 2017. Credible or not, the testimony does

not support the finding that the property is currently being used for a commercial purpose or that it was used for a commercial purpose at any point past 2016.

**1. Traffic Coming Up and Down the Road and the “Parking Lot” Near the Little Barn House Do Not Establish that the Ferron Property or the Road Were Being Used for a Commercial Purpose.**

Kennith and Gena testified regarding the traffic on their road and acknowledged that it was a busy road at times, particularly in 2019. The facts establish that the Ferron Property was visited often by friends, family (including family that resided with Kennith and Gena, like cousin Zach and Kennith’s daughter, Stephanie and her two children), service providers, and an unknown number of vehicles that belonged to the renters of the little barn house and their visitors. Unlike Kennith, who could actually identify the vehicles and their drivers, Plaintiff and Redd acknowledged that they did not know the identities of virtually any person in the vehicles that were using Kennith’s road, other than Breck, who was Gena’s friend and training partner that never paid to train with Gena. Tr. 92-93; Tr. 186.

As for the “parking lot” built by Ferron and partially paid for by Sherry, the former owner of the little barn house rental, Redd admitted that she did not know the identity of the people who were parking there and admitted that, since 2015, she did not know if the renters of the little barn house parked in the “parking lot.” Tr. 95.

While there may have been traffic on the road and that traffic may have annoyed Plaintiff, it was not traffic related to a commercial use of the Ferron

Property. Tr. 92-93; 230-231; 312-313; 264-265; 281-283. If Plaintiff and his witness didn't even know who was in the vehicles, it does not appear that the evidence of "traffic going up and down the road" is substantial evidence of commercial use of the Ferron Property.

**2. Evidence of People Parking and Going Into the Gym After 2016 Does Not Establish a Commercial Use of the Ferron Property.**

The fact that Plaintiff and Redd saw people "parking and going into the gym with gym bags" is not evidence that those people were paying to use the gym equipment or to receive training from Kenneth or Gena. Kenneth and Gena both testified that friends and family have used and still sometimes use the Ferron Property for working out (Breck, Kenneth's daughter and son-in-law, Wisher and her disabled daughter, and other friends and family members of Kenneth and Gena since 2016), sports (son-in-law and archery), and some storage and recreational maintenance and repair of vehicles. Tr. 143.

The District Court's finding in this regard is not even accurate as to Plaintiff's testimony. Order, Dkt. 48, FOF 16. When questioned about whether he could actually see the door of the gym/shop, Plaintiff admitted that he could not see whether people who parked near the building even entered it because he could not see the door of the shop/gym area from his home. Tr. 186. Plaintiff claims he saw them park and then the music would start so that was evidence that they were in the building but even if we assume Plaintiff is accurate as to those persons entering the

shop/gym area and turning on the stereo, it still does not establish as fact that those people were paying customers of a “commercial gymnasium” on the Ferron Property.

**3. Redd’s Testimony Regarding Gena’s Social Media Postings, Credible or Not, Does Not Establish a Commercial Use of the Property.**

Kathy Redd’s testimony made clear that she was the one combing Gena’s Facebook account for evidence of Gena’s use of the gym. Tr. 98-107. Redd would find a post of Gena’s on one electronic device (like an I-Pad) and then photograph it with another electronic device. Tr. 99. Redd also testified that the various photos taken of both Gena and Breck merely demonstrated that Gena worked out in her own gym and that Breck worked out there with her, too, sometimes. Tr. 100, 67-71. Again, this is not proof of a commercial business, particularly since Breck testified repeatedly that she did not pay Kenneth or Gena anything for using the gym or for training services. Tr. 9-10. Credible or not, Redd’s testimony does not support the Court’s finding of use for a commercial purpose.

**B. Kenneth’s Testimony Regarding Prior Commercial Use Does Not Establish Any Current Commercial Use of the Ferron Property.**

Just because Kenneth admitted that he used the shop/gym area for some paid training prior to 2016, it does not follow that he is using it for that purpose now. Plaintiff introduced no evidence to establish any commercial use since that time.

**C. Kenneth's Lack of Income Is Not Substantial Evidence That Kenneth Is Operating a Commercial Fitness Business From His Property.**

As established in the Statement of Facts, Kenneth has spent the last several years caring for his aging parents and assisting them with remodeling their home. He has had to rely on savings, borrow money and as he testified, he also sold an oriental rug for approximately \$65,000.00 after his divorce from Diane.

The Court's finding states that while Kenneth "denies any commercial activity since, it begs the question how he has been supporting himself." Order, Dkt. 48, FOF 15 (emphasis added). The term "begs the question" is certainly a troubling one to hear coming from a fact-finder. The term is formally defined to mean "to ignore a question under the assumption it has already been answered." The phrase itself comes from a translation of an Aristotelian phrase rendered as "beg the question" but meaning "assume the conclusion." See <https://www.Merriam-Webster.com>.

Assuming the conclusion (as fact) that Kenneth must be running a commercial training business on the Ferron Property because he has no verified income or tax returns is a real stretch and the conclusion is certainly not supported by substantial evidence.

**D. Gena's Testimony and Social Media Posts Do Not Establish That Any Commercial Business or Transactions Took Place on the Ferron Property.**

The issue of Gena's social media posts and her related testimony was central to the District Court's finding that the Ferron Property was being used for a

commercial purpose. Order, Dkt. 48, FOF 12, 17. The District Court clearly relied on Plaintiff's Exhibit 23 as evidence of commercial use from 2017 to current times. When examined individually and in conjunction with the testimony of Gena, Kenneth and Kathy Redd, it is apparent that the Court's finding of commercial use relying on Exhibit 23 is not supported by substantial evidence.

**1. Exhibit 23 - Page 1:** Posted in January 2020 on Facebook, the exhibit shows a portion of a photo of Gena's back while training in her own home gym. The post's text states *"Advanced Functional Fitness. Motivation is what gets you started. Habits is what keeps you going. 48 strong. Love our gym time."* (emphasis added).

There is nothing in the 2020 post advertising any fitness service or business. The words Advanced Functional Fitness do not even include the term "LLC" at the end to indicate Gena's newly acquired business entity name and even if it did, it still does not invite anyone to contact Gena or do business with her. Furthermore, Gena testified that she formed the LLC in late 2019 at the request of her employer, Iron Horse, so that she could provide training services on a contract basis to Iron Horse residents. The words "advanced functional fitness" with a photo of Gena working out in her home gym do not demonstrate or even hint at any use for a commercial purpose in 2020.

**2. Exhibit 23 - Page 2:** This blurry, undated photo appears to be the same photo as Page 1, just a very bad one that is cut off and has two words of text on the

photo that say “when training.” This partial photo of Gena working out in her home gym do not demonstrate or even hint at the Ferron Property being used for a commercial purpose.

**3. Exhibit 23 - Page 3:** This undated internal photo of the shop/gym area includes 2 vehicles and an ATV, along with some gym equipment. This photo shows nothing more than the inside of the gym on some unknown date and does not demonstrate that the Ferron Property is being used for a commercial purpose. In fact, it supports Kenneth and Gena’s testimony that the building is used for storage.

**4. Exhibit 23 - Page 4:** This photo shows a picture of a post made by Gena on Facebook on what appears to have been July 31, 2020. The text of the post says *“Train for quality of life because you can. 48 strong. 7/31/20.”* (emphasis added). There is some text on the photo as well but it is so blurry it cannot be deciphered. The post language itself, however, is clearly meant to be inspirational and is not inviting anyone to do business with Gena, fitness training, massage or otherwise. This photo of a photo of Gena working out in her home gym in 2020 with an inspirational quote does not demonstrate or even hint at the Ferron Property being used for a commercial purpose in 2020.

**5. Exhibit 23 - Page 5:** Appears to be the same photo/post on page 5 and does not demonstrate any commercial use, as stated in the previous paragraph.

**6. Exhibit 23 – Page 6:** This cut off photo of a photo of a Facebook post by Gena was made just prior to the 2020 New Year, as indicated in the text of the post. The text states *“Cheers to the exciting New Year 2020 coming up! Hugs and kisses to family, friends and massage clients for your support and business over the many years. Appreciate it always. Wishing you all the best for a fabulous New Year.”* (emphasis added). This photo of a post by Gena wishing her massage clients a happy New Year and thanking them for their business does not demonstrate or even hint at the Ferron Property being used for a commercial purpose.

**7. Exhibit 23 - Page 7:** Exhibits 7 through 9 appear to have caused the Court the greatest concern. Page 7 of Exhibit 23 shows a photo of Gena’s face only and contains the following text:

*“As a massage therapist for the past 19 years, I know the bodies mechanics as well as being in the fitness world for 10 years and have competed in several fitness shows. We own a private gym facility in Kalispell. If your wanting more out of your workouts and are intimidated by fitness equipment, I will show you how to use fitness equipment correctly to help strengthen certain muscle groups with variations of dumbbells, cable machine and smith machine.”*

It is unknown exactly when Gena made this Facebook post. Although the date at the bottom of the page indicates “2/26/17,” Redd admitted during trial that the date of 2/26/17 is the date she printed the page, not the date of the post. Redd did not know the date of the post but even assuming that it was posted in February 2017, it is still not evidence that the Ferron Property was actually being used for a

commercial purpose. Gena's language indicates that she "owns" a private gym facility in Kalispell but it does not invite anyone to come to the facility. The only offer she makes in the post's language is to show a person how to use some basic fitness machines. It does not say that she will charge them a fee to show them or give any sort of rate or a specific location as to where she might show them.

Even assuming for the sake of argument that Gena *was* inviting someone to come to the Ferron Property so that she could show them how to use the machines for a fee, Gena testified that she did not gain a single client from the post. Even more importantly, the date of the post is unknown – The only evidence regarding date is Redd's testimony that she printed the post in February 2017. Again, even assuming the post was made in early 2017, it does not prove that the Ferron Property was being used for a commercial purpose after February 2017.

**8. Exhibit 23 – Page 8:** Here, again, we have a Facebook post by Gena that is undated but has enough indicators to establish that it was likely made in early 2017 and again, Redd acknowledged that the date along the bottom of 2/26/17 is when she printed the post for her collection of evidence against Kenneth and Gena. The text of the post states:

*"It has nothing to do with how much we lift, its all about the right execution & form so you don't get injured. We all have to start somewhere, I believe we all have a responsibility not only to ourselves but to our mates and kids to teach them to live better and healthier lives so that they can choose to make healthier choices. I encourage you to take that step to getting healthy for yourself, because it truly is about*

*you. If you have injuries or not into lifting weights, I have a Pilates reformer machine that supports your low back and body that's not invasive on your joints, but gives you a great resistance workout at the same time. Take time for yourself. You are worth it. Private message me if interested. Located in Kalispell. 60 minute fitness session \$50."* (emphasis added).

Gena's post clearly intends to inspire others to work on their fitness and she discusses a machine she owns that can help with resistance training, inviting individuals to private message her "if interested" and noting her location and rate. Of all of the pages of Exhibit 23, this is the only one that can truly be construed as an advertisement of fitness training services. But it is still not substantial evidence that the Ferron Property was being used for a commercial purpose. Again, Gena testified that this post did not generate any business for training at the Ferron Property. She also testified that she utilized the same reformer machine at Iron Horse and was able to make videos to show her Iron Horse or other mobile clients how to use the machine. The fact that Gena herself is located in Kalispell (the post says nothing about a fitness facility or private gym in Kalispell) is not indicative of commercial use of the Ferron Property and even if it was – Even if this post was truly intended to invite people to train at the Ferron Property for a fee – there was no evidence introduced by Plaintiff that a single individual ever actually DID pay for training at the Ferron Property after approximately 2016. While the post could be interpreted to mean that Gena desired to train for a fee on the Ferron Property, it does not establish that any such training ever occurred. Gena and Ken deny any paid

use after approximately 2016 and Plaintiffs have no evidence of any such commercial use after 2016 other than a few words of testimony from Kenneth's bitter ex-wife that is discussed below in Section E.

**9. Exhibit 23 – Page 9:** Page 9 of Exhibit 23 appears to be the same post shown on Page 8 but was cut off along the top and printed on 3/2/2017. For the same reasons outlined above, Page 9 is also not evidence of commercial use after 2016.

**10. Exhibit 23 – Page 10:** Redd took this photo of an online listing for Gena's mobile massage business and Plaintiff attempted to use it to establish that Gena was conducting a massage business from the Ferron Property. As testified to by Gena, the listing indicates her location in Kalispell and gives the address of the Ferron Property because that is where her home office is located and, as a mobile business, she had no other address to provide. Page 10 is not indicative of a commercial use of the Ferron Property and is not especially relevant to this appeal as the District Court found that Gena's home office for her massage business was an acceptable use of the property under the covenants. Order, Dkt. 48, FOF 13.

**11. Exhibit 23 – Page 11:** The undated photo depicts Gena and Breck in the shop/gym area on the Ferron Property. Based on Breck and Gena's testimony, this photo had to have been taken in approximately 2018 or 2019. It clearly shows two friends in a fun photo and nothing else (except perhaps the vehicles stored behind Breck, indicating that the shop/gym area was used for storage of vehicles).

The photo of Breck and Gena is not evidence of a commercial use of the Ferron Property because Breck never paid Gena for use of the shop/gym area or for any training services.

**E. The Biased and Unsupported Testimony of Ex-Wife Diane Ferron Is Not Substantial Evidence Current Commercial Use of the Ferron Property.**

The District Court's findings relied heavily on Diane Ferron's testimony. Specifically, the court zeroed in on Diane's very limited testimony that she had friends who were currently paying to "use the gym." Order, Dkt. 48, FOF 12 and 14. Diane Ferron also admitted that she has not been to the Ferron Property since 2012 and has no idea how Kenneth is using the Ferron Property. Tr. 48.

The District Court's findings of fact do not reflect the evidence that was presented at trial. Plaintiff did not produce any concrete evidence of commercial use of the property after approximately 2016. The court's decision relies heavily on a brief snippet of biased testimony from Diane Ferron that is completely unsupported by any other evidence establishing use of the property for commercial purposes after approximately 2016. While it may have been "evidence," it is hardly "substantial evidence." Even if substantial evidence exists, it is Ferron's position that the Court misapprehended the effect of the evidence. See *Interstate Production Credit v. DeSaye (1991)*, 250 Mont. 320, 322-23, 820 P.2d 1285, 1287.

Other than Diane's obviously biased testimony against her ex-husband, Plaintiff introduced absolutely no evidence that any person was currently paying for

any commercial or business service on the Ferron Property. Plaintiff's case lacked much evidence at all and included:

- No testimony at all from a current or former user of the gymnasium/shop building, other than Breck, who testified that she was there as a guest of Gena and never paid for training or use of the facility;
- No documentary or testimonial proof of a single paying client ever for Gena, fitness or massage;
- No proof of any payments to Kenneth for training or use of the facility since Redd's 2014 checks to Kenneth;
- No documentary or testimonial proof of any income to Kenneth or Gena from the alleged commercial activity since 2014;
- No business records of any kind, other than documents related to Gena's 2019 formation of Advanced Functional Fitness, LLC, which was formed at the direction of Gena's employer, Iron Horse, so that she could provide fitness instruction at Iron Horse.

Plaintiff may have established that there was traffic on the road but Redd admitted they did not know the identity of the persons in the vehicles. Plaintiff and Redd claimed to see people park and "enter" the gym, but Plaintiff also acknowledged that he could not see the door of the gym from his house so he did

not know whether the persons parking were, in fact, entering the building at all. Tr. 86.

The Court's decision does not reflect the testimony or evidence presented at trial and is not supported by substantial evidence.

**II. THE TRIAL COURT'S GRANTING OF INJUNCTIVE RELIEF WAS IMPROPER AND MUST BE REVERSED BASED ON ITS ERRONEOUS FACTUAL FINDINGS.**

Montana Code Annotated § 27-19-101 and § 27-19-102 certainly allow for the injunction that was granted in this matter. This issue is only raised in conjunction with Issue I in that the Court's conclusion that Plaintiff was entitled to injunctive relief and attorney's fees hinges on its factual findings related to a business and/or commercial use. Because the factual findings in this regard are in error, the granting of the injunction and award of attorney fees is also in error and must be reversed.

**CONCLUSION**

For the reasons stated above, this Court should reverse and remand for the District Court to enter judgment in accordance with this Court's opinion.

Respectfully submitted this 1<sup>st</sup> day of July, 2022.

BRECK LAW OFFICE, PC

By: X Stephanie M. Breck  
Stephanie M. Breck  
Post Office Box 2071  
Columbia Falls, MT 59912  
Attorneys for Defendant/Appellant

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief is proportionally spaced typeface of 14 points and does not exceed 10,000 words.

X Stephanie M. Breck  
STEPHANIE M. BRECK  
Attorney for Defendant/Appellant

## CERTIFICATE OF SERVICE

I, Stephanie M. Breck, of Breck Law Office, PC, hereby certify that I have filed a true and accurate copy of the foregoing Appellant's Brief with the Clerk of the Montana Supreme Court, and that I have mailed a copy to each attorney of record and any party not represented by counsel as follows:

Ms. Peg Allison  
Clerk of Court  
Flathead County Justice Center  
920 South Main, Suite 300  
Kalispell, MT 59901

Richard De Jana & Associates, PLLC  
Richard De Jana  
P.O. Box 1757  
Kalispell, MT 59903  
[rdj.dejanalaw@gmail.com](mailto:rdj.dejanalaw@gmail.com)  
[rdejana@montanasky.net](mailto:rdejana@montanasky.net)

Counsel for Plaintiff/Appellee

DATED this 1<sup>st</sup> day of July, 2022.

X. Stephanie M. Breck  
STEPHANIE M. BRECK

## CERTIFICATE OF SERVICE

I, Stephanie M. Breck, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-01-2022:

Justin Glenn Breck (Attorney)  
Post Office Box 2071  
Columbia Falls MT 59912  
Representing: Kenneth G Ferron  
Service Method: eService

Richard P. DeJana (Attorney)  
120 4th Street West  
P.O. Box 1757  
Kalispell MT 59903  
Representing: Michael A Santacroce  
Service Method: eService

Electronically signed by Marcy Marie Hall on behalf of Stephanie M. Breck  
Dated: 07-01-2022